90-618

No.

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

OCTOBER TERM, 1990

TOLEDO BLADE COMPANY,

Petitioner,

v.

TOLEDO TYPOGRAPHICAL UNION NO. 63,
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an employer, who was the prevailing party in unfair labor practice proceedings before the National Labor Relations Board but was not a party to the union's appeal of the Board's decision to the court of appeals, have sufficient interest and standing to seek and be granted a writ of certiorari in this Court to review the lower court's ruling, where none of the parties to the appeal below seek review by this Court?

2. Did the National Labor Relations Board reasonably conclude that an employer's proposal to retain the right to offer retirement and/or separation incentives directly to employees is a mandatory subject of bargaining?

LIST OF THE PARTIES TO THE PROCEEDING BELOW

Toledo Typographical Union No. 63, Petitioner below. National Labor Relations Board, Respondent below.

LIST OF PETITIONER'S PARENT COMPANIES AND SUBSIDIARIES

The Toledo Blade Company is a division of Blade Communications, Inc.

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TOLEDO TYPOGRAPHICAL UNION NO. 63,
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NATIONAL LABOR RELATIONS BOARD,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Toledo Blade Company petitions for leave to intervene and for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 17, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit in *Toledo Typographical Union No. 63 v. National Labor Relations Board* is printed at Appendix A hereto, *see infra* p. 1A, and is reported at 907 F.2d 1220 (D.C. Cir. 1990). The Decision and Order of the National Labor Relations Board in *Toledo Blade Company* is printed at Appendix B, *see infra* p. 1B, and is reported at 295 NLRB No. 68, 131 L.R.R.M. (BNA) 1460 (1989).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on July 17, 1990. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151 *et. seq.* (1973 and 1990 Supp.), are printed in Appendix C, *see infra* p. 1C.

STATEMENT OF THE CASE

This case arises from a Decision and Order of the National Labor Relations Board (the "NLRB" or the "Board"), Respondent herein, dismissing a complaint against the Toledo Blade Company (the "Employer"), Petitioner herein, alleging that the Employer had commited unfair labor practices during collective bargaining with the Toledo Typographical Union No. 63 (the "Union"), also Respondent herein. Upon the Union's petition for review, the District of Columbia Court of Appeals set the Board's order aside and refused to enforce it, remanding the case to the NLRB.

Because the Employer was the prevailing party before the Board, it was not a party to the Union's appeal of the Board's order. The Board has determined that it will not seek review in this Court or otherwise of the lower court's ruling.

The Employer publishes *The Toledo Blade*, a daily newspaper in Toledo, Ohio. The Union has represented the Employer's composing room employees for a number of years, and the Employer and the Union have been parties to successive collective bargaining agreements.

The Employer gave lifetime job guarantees to composing room employees in exchange for the right to introduce labor-saving technology. As a result, it cannot involuntarily lay off surplus

composing room employees covered by the job guarantee. In the 1976 and the 1979 collective bargaining agreements, however, the parties agreed that the Employer could unilaterally offer voluntary retirement and/or separation incentives to job-guaranteed employees. The provision, common in the newspaper industry, read:

> The Company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the Company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto.

In 1982 collective bargaining negotiations, the Union refused to renew this waiver provision and filed charges alleging that the Employer violated Sections 8(a)(1) and (5) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 158(a)(1) & (5) (1973), by insisting to impasse on including the provision in a new contract.

The NLRB dismissed the complaint against the employer in *Toledo Blade Co.*, 295 NLRB No. 68, 131 L.R.R.M. (BNA) 1460 (1989), Appendix B, *infra* p. 1B. In assessing whether the Employer's action was lawful, the NLRB noted that the subject matter of the disputed provision—retirement and separation incentives—is a mandatory subject of bargaining. 131 L.R.R.M. (BNA) at 1461, Appendix B, *infra* at p. 3B. The NLRB also held that even though the provision would require the Union to waive its right to act as bargaining agent for the affected employees, the waiver did not "transform" the provision from a mandatory to a permissive subject of bargaining. *Id.* at 1462, Appendix B, *infra* at pp. 3B-4B. In this respect, the NLRB found the provision similar in effect to other waiver-of-bargaining clauses, such as management rights and zipper clauses, that have been found to be mandatory subjects of bargaining. *Id.*, Appendix B, *infra* at p. 4B.

Upon the Union's petition for review, the court below set aside the Board's order and contrary to the Board, held that the Em-

ployer's insistence to impasse on the waiver provision concerned a permissive subject of bargaining and consequently was a violation of § 8(a)(5) of the NLRA. 907 F.2d at 1225, Appendix A, *infra* at p. 9A. The lower court also remanded the case to the Board for further action.

REASONS FOR GRANTING INTERVENTION AND THE PETITION FOR A WRIT OF CERTIORARI

I. The Petitioner Has Standing to Seek Review of the Ruling of the United States Court of Appeals for the District of Columbia Circuit Even Though It Was Not a Party to That Proceeding.

Although not a party to the proceeding below, the Employer has standing to complain of the lower court's decision. The test as stated by this Court in *Baker v. Carr*, 369 U.S. 186 (1962), is:

> [Has Petitioner] alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions? This is the gist of the question of standing.

369 U.S. at 204. Since the court below found that the Employer's bargaining conduct was illegal, Petitioner unquestionably has a personal stake in the outcome of this controversy. Moreover, because the Labor Board has declined to seek review of the lower court's judgment in this Court or otherwise, Petitioner's interest in this matter is not even arguably represented by another litigant. Simply put, the Employer will be deprived of the opportunity to vindicate itself unless this Court grants it intervenor status.

This Court has permitted a non-party to intervene in order to file a brief in support of its interests in circumstances less compelling than those of this case in *NLRB v. Acme Industrial Co.*, 384 U.S. 925 (1966), 385 U.S. 432 (1967). The union in *Acme Industrial,* having prevailed in unfair labor practice proceedings before the Labor Board, did not participate in judicial review

proceedings in the court of appeals. The court of appeals set aside the Board's order and refused to enforce it. In contrast to this case, the Labor Board in *Acme Industrial* filed a petition for a writ of certiorari, which this Court granted. The union sought to intervene in proceedings before this Court in order to file a brief in support of its interests in the labor controversy. Notwithstanding the fact that the union's interests arguably were represented by the Board, this Court granted the union leave to intervene.

This Court's decision in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205 (1965), also supports granting Petitioner leave to intervene. In that case, the Court considered whether parties who are wholly successful in unfair labor practice proceedings before the Labor Board have a right to intervene in court of appeals review proceedings brought by the unsuccessful parties. 382 U.S. at 207. In one of the two consolidated cases before the Court in *Scofield*, the charged party had been wholly successful before the Board, in the other, the charging party had prevailed. *Id.* at 207-08. Both successful parties had filed motions to intervene in the court of appeals review proceedings and both had been denied, but granted leave to file *amicus* briefs. Each sought review in this Court of the courts of appeals' denials of their motions to intervene; the Court granted certiorari. *Id.* at 207-08.

The Court held that both successful charged parties and successful charging parties have a right to intervene in court of appeals proceedings reviewing Labor Board orders. 382 U.S. at 208. It premised its decision on its concerns for judicial economy and policies underlying the Labor Act.

The Court's concerns for judicial economy as described in *Scofield* support granting Petitioner leave to intervene in this case. As this Court pointed out, a reviewing court's decision to set aside a Board order dismissing a complaint has the effect of

returning the case to the Board for further proceedings (as in fact, this case was remanded by the lower court's July 17, 1990 judgment). This generally results in the Board's entering an order against the previously successful party. 382 U.S. at 212. From this order, the now unsuccessful party may seek review under Section 10(f) of the Labor Act in a court of appeals. *Id.*

Section 10(f) of the Labor Act provides that persons aggrieved by an order of the Board may seek review of the order in the court of appeals for the District of Columbia or in any United States court of appeals wherein the person resides or transacts business or wherein the unfair labor practice allegedly took place. 29 U.S.C.§ 160(f)(1973). The Act provides presently aggrieved, although formerly successful, persons with the opportunity to "circuit shop" or try their luck in a forum other than the one that decided the first appeal. 382 U.S. at 213. This, as the Court noted in *Scofield*, leads to "useless proliferation of judicial effort," *id.*, but can be avoided by granting intervenor status in review proceedings to parties who are successful before the Board. Indeed, "[p]ermitting intervention in the first review . . . centralizes the controversy and limits it to a single decision, [thereby] accelerating final resolution. This is in accord with one of the objectives of the Labor Act—the prompt determination of labor disputes." *Id.*

Concededly, the Employer had a right to intervene in the proceedings below and did not do so. However, it is presently no less personally aggrieved by the lower court's judgment than it would have been if it had preserved its party status by filing an appearance in the court below. Moreover, the Court's rationale for its decision in *Scofield* applies with no less force here because the Employer failed to intervene in the court below. As in *Scofield*, granting intervenor status to Petitioner would have "the salutory effect of insuring prompt adjudication" of this matter and may "obviate the need for supplemental agency or court proceedings." 382 U.S. at 215-16.

II. This Case Presents an Important Question of Federal Law That Should be Decided by This Court, Concerning the System of Collective Bargaining and, Specifically, Whether Renewal of Right to Make Retirement/Separation Incentive Offers Directly to Employees is a Mandatory Subject of Bargaining.

The issue presented in this case is central to the development and maintenance of the collective bargaining system in this country. Under the lower court's analysis, the extent of union and/or management participation in the administration of matters which, in and of themselves, are mandatory subjects of bargaining, is not a condition of employment to be settled by bargaining. The approach of the court below is detrimental to the federal labor policy promoting collective bargaining, and is likely to create confusion and uncertainty concerning the scope of the duty to bargain.

The Employer in this case sought flexibility from the Union to deal directly with job-guaranteed employees in the area of retirement and separation incentives. The Board and the courts have held that retirement and separation incentives are mandatory subjects of bargaining. *See Baltimore News American Div.*, 230 NLRB 216, 217-18 (1977), *enforced as modified, NLRB v. Baltimore News American Div.*, 590 F.2d 554, 556 (4th Cir. 1979).

In prior labor contracts, the Union here had agreed to allow the Employer the right to make termination incentive offers directly to employees, because the employees were not otherwise subject to layoff or termination due to their job guarantee. Clearly, the Employer's flexibility in this area was of great importance to the parties. Indeed, as the lower court recognized, the interests of the Union may be contrary to the desires of individual employees seeking to procure an incentive from the Company in order to terminate employment. 907 F.2d at 1225, Appendix A, *infra* at pp. 8A-9A.

The lower court should not have disputed the Board's finding that reservation of management's right to make incentive offers directly to employees is a mandatory subject of bargaining. Along these lines, this Court held in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952), that the degree of union participation in the administration of terms and conditions of employment is, in itself, a condition of employment to be settled by bargaining:

> Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.

Id. at 409.

The lower court ignores this teaching and, as a result, contravenes both the legislative history and the policies of the NLRA, which strongly support the Board's determination here that Congress intended to subject a broad spectrum of matters to mandatory bargaining. Congress did not "limit narrowly the subject matters appropriate for collective bargaining." H.R. Rep. No. 245, 80th Cong., 1st Sess. at 71 (1947) (minority report). Instead, the relevant legislative history indicates that Congress intended to subject a wide range of matters to mandatory bargaining. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 495-96 (1979). The sponsors of the NLRA viewed the broad scope of collective bargaining as a primary policy of the Act, because refusals to bargain and negotiate had been a major cause of industrial strife. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42-43 (1937).

Accordingly, a writ of certiorari should be granted to restore the principle that reservation of a specific management function

is a term or condition of employment to be resolved by collective bargaining, consistent with the teaching of *American National Insurance*:

> Experience shows that the reservation of specific management function is consistent with the kind of collective bargaining intended by the NLRA. Experience also shows that companies may not only honestly seek, but often actually negotiate, such contracts with labor unions.

A. Cox, *The Duty to Bargain in Good Faith,* 71 Harv. L. Rev. 1401, 1425 (1958).

III. The Decision Below Departs from This Court's Decisions by Disregarding the NLRB's Primary Function and Responsibility for Determining the Issues Subject to Mandatory Bargaining, and by Adopting a Per Se Rule Against an Employer's Insistence Upon a Limited Right to Make Separation/Retirement Incentive Offers Directly to Employees.

Congress delegated to the NLRB the primary responsibility for determining which subjects are mandatory bargaining topics. *Ford Motor Co. v. NLRB,* 441 U.S. 488, 496-97 (1979). The NLRB's judgment is subject to judicial review; but if its construction of the statute is "reasonably defensible," it should not be rejected merely because the courts might prefer another view of the statute. *Id.* at 498.

The lower court disregarded the NLRB's construction of the statute in this case, even though it is clearly "reasonably defensible." The Board found that the proposal in dispute was a mandatory subject of bargaining, similar to other waiver-of-bargaining clauses such as certain management-rights and zipper clauses that have also been held to be mandatory subjects of bargaining. 131 L.R.R.M. (BNA) at 1462, Appendix B, *infra* at p. 4B (*citing NLRB v. American National Insurance Co.,* 343 U.S. 395, 409 (1952); *NLRB v. Tomco Communications, Inc.,* 567 F.2d 871 (9th Cir. 1978)).

The lower court concluded that the Employer's waiver proposal is offensive because it reserves unto management the right to exclude the union from the administration of termination incentive offers. Yet, this condition of employment is precisely the type of topic which this Court held was to be settled by bargaining in *American National Insurance.* 343 U.S. at 409. Thus, the Board's decision is "reasonably defensible."

In an effort to justify its holding that the Employer's waiver proposal is "fundamentally inconsistent with the structure of the Act," the lower court compares the proposal to the "ballot" clause proposal in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958), that required the union to hold a secret vote on the employer's last offer before calling a strike. The vice of the ballot clause proposal was that it represented an unwarranted intrusion into the internal affairs of the union. 356 U.S. at 349-50; *see also NLRB v. Cheese Barn, Inc.*, 558 F.2d 526, 530 (9th Cir. 1977); *Houchens Market of Elizabethtown, Inc. v. NLRB,* 375 F.2d 208, 212 (6th Cir. 1967). The Employer's proposal here concerns solely its discretion to induce employees with lifetime job guarantees to retire. That is, it "regulates the relations between the employer and the employees," whereas the ballot clause proposal "deal[t] only with relations between the employees and their unions." 356 U.S. at 350.

The lower court warns that if an employer can insist upon the limited waiver here, what would lawfully prevent the employer from going to impasse over whether it has to deal with the union at all. 907 F.2d at 1224, Appendix A, *infra* at p. 7A. The answer to this academic query is self-evident. The legitimacy of any waiver-of-bargaining clause must depend upon its scope in the context of the overall negotiations. Where, as here, the proposal is confined narrowly to the administration of a specific subject of employment, the Board's approach promotes collective bargaining and the lower court's concern is misplaced.

In sum, the lower court's efforts both to justify its disregard for the NLRB's judgment and to distinguish this case from the decision of this Court in *American National Insurance*, *supra*, are unavailing.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for leave to intervene and petition for a writ of certiorari.

Respectfully submitted,

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October 15, 1990

APPENDIX A

907 F.2d 1220

TOLEDO TYPOGRAPHICAL UNION
NO. 63, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD.
NO. 89-1481.

United States Court of Appeals,
District of Columbia Circuit.

Argued May 11, 1990.
Decided July 17, 1990.

Petition for Review of a Decision of the National Labor Relations Board.

James B. Coppes, with whom Marsha Berzon, Richard Rosenblatt, and Samuel C. McKnight were on the brief for petitioner.

John H. Ferguson, Attorney, N.L.R.B., with whom Robert E. Allen, Associate General Counsel, and Aileen A. Armstrong, Deputy Associate General Counsel, were on the brief for respondent. Steven B. Goldstein also entered an appearance for respondent.

Before D.H. GINSBURG, SENTELLE, and THOMAS, Circuit Judges.

Opinion for the Court filed by Circuit Judge D.H. GINSBURG.

D.H. GINSBURG, Circuit Judge:

Toledo Typographical Union No. 63 represents the composing room employees of the company that publishes the Toledo Blade, a daily newspaper. In negotiations over a new collective bargaining agreement (CBA) the Employer insisted upon the inclusion

of a clause allowing it to deal directly with employees over retirement issues, and to exclude the Union from such individual negotiations; its purpose was to "buy out" the employees' lifetime job guarantees upon the most favorable possible terms. The Union charged the Employer with violating, *inter alia*, § 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), but the Board found that the clause concerns a mandatory subject of bargaining and upheld the Employer's position. 295 N.L.R.B. No. 68, 131 L.R.R.M. (BNA) 1460 (June 15, 1989).

The clause upon which the Employer went to impasse would, in our view, allow it to prevent the Union from playing an important role reserved to it by statute. Accordingly, we grant the petition for review.

I. BACKGROUND

In their 1976 and 1979 CBAs, the Union agreed that the Employer could negotiate directly with individual employees over the buy-out of the lifetime job guarantees that it, like many newspaper publishers, had previously given as the price of introducing labor-saving technology. The provision read:

> The Company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the Company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto.

131 L.R.R.M. at 1461. The parties have stipulated that the intent of the clause was:

> to permit the Company to make retirement and/or separation incentive offers directly to individual employees; and the Union has no right to participate in such discussions between the Company and individuals concerning the acceptance, rejection or changes in the retirement and/or separation incentive offers.

In 1982, the parties bargained to impasse over inclusion of the same "direct dealing" clause in a new contract. The Union then filed a charge with the NLRB, alleging that the Employer, by insisting upon a clause concerning a non-mandatory subject of bargaining, had refused to bargain in good faith, in violation of § 8(a)(5).

The Board, with one member dissenting, dismissed the complaint, holding that the direct dealing clause concerns "terms and conditions of employment," 29 U.S.C. § 158(d), and is therefore a mandatory subject over which the employer may bargain to impasse. *See generally NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 348-49, 78 S.Ct. 718, 722-23, 2 L.Ed.2d 823 (1958); *Idaho Statesman v. NLRB*, 836 F.2d 1396, 1400 (D.C. Cir. 1988). The Union argues that the proposed clause is not a mandatory subject of bargaining because it would undermine the Union's role as the employees' exclusive representative by depriving it of the right to represent employees in buyout negotiations.

II. ANALYSIS

Determining whether a matter is a mandatory subject of bargaining is "at the heart of the Board's function." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497, 99 S.Ct. 1842, 1949, 60 L.Ed.2d 420 (1979). Its decisions, if "reasonably defensible, . . . should not be rejected merely because the courts might prefer another view of the statute." *Id.*; *see also United Food and Commercial Workers Int'l Union Local 150-A v. NLRB*, 880 F.2d 1422, 1433 (D.C. Cir. 1989). Where the Board's determination is "fundamentally inconsistent with the structure of the Act," however, the court must reject its interpretation. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318, 85 S.Ct. 955, 967, 13 L.Ed.2d 855 (1965); *see also NLRB v. Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965) ("Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate

the congressional policy underlying a statute."). This is such a case.

An employer may deal directly with its employees over any lawful matter if it first obtains the consent of their union. *See J.S. Case Co. v. NLRB*, 321 U.S. 332, 338, 64 S.Ct. 576, 580-81, 88 L.Ed. 762 (1944) (direct dealing is particularly appropriate where "there is great variation in circumstances of employment or capacity of employees") (dictum); *see also*, under the Railway Labor Act, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 347, 64 S.Ct. 582, 585-86, 88 L.Ed. 788 (1944) ("It may be agreed that particular situations are reserved for individual contracting, either completely or within prescribed limits."). But an employer that negotiates directly with an individual employee, without first bargaining with the union, violates § 8(a)(5). *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 684, 64 S.Ct. 830, 833, 88 L.Ed. 1007 (1944). The parties agree that the subject about which the direct dealing clause would permit the Employer to deal directly with its employees—early retirement and separation incentives for employees with lifetime employment guarantees—would itself be a mandatory subject of bargaining. In other words, if the Employer wants to bargain over changes in the status quo on retirement and separation incentives, then the Union must join issue with it in good faith, and either side may insist upon its position to the point of impasse. The issue upon which Employer and Union are now divided is whether the first derivative of that underlying subject, *viz*, the Employer's demand to bargain directly with employees over changes in their retirement rights, to the exclusion of the Union, is also a mandatory subject of bargaining.

The Board concedes that the proposal involves a limited waiver of the Union's statutory right to bargain collectively. 131 L.R.R.M. at 1461-62. If the proposal is deemed "permissive," then the Employer may not bargain to impasse over it, but is remitted either to living with the status quo, in which it has a

contractual obligation to provide lifetime employment to some employees, or in bargaining with the Union—not the individual employees—over changes in the status quo. If, on the other hand, the proposal is mandatory, as the Board found, then the Employer lawfully bargained to impasse. Whether the Employer could thereafter implement the proposal without the Union's consent is not at issue in this case, but a related question is pending before the Tenth Circuit in *Colorado Ute Elec. Ass'n. Inc.*, 295 NLRB No. 67, 131 L.R.R.M. (BNA) 1457 (June 15, 1989), *pet. for review pending*, No. 89-9545 (10th Cir.) (whether employer may unilaterally implement merit pay raises after impasse.)

In urging that the proposal for direct dealing is a mandatory subject, and therefore that the Employer could lawfully go to impasse over it, the Board relies principally upon *NLRB v. American National Ins. Co.*, 343 U.S. 395, 72 S.Ct. 824, 96 L.Ed. 1027 (1952), *see* 131 L.R.R.M. at 1462, which pre-dated the distinction between mandatory and non-mandatory subjects. In *American National*, the Court held that an employer's insistence upon a "management functions" clause that would give it a free hand in setting certain terms and conditions of employment—that is, mandatory subjects of bargaining—is not *per se* unlawful. 343 U.S. at 409, 72 S.Ct. at 832. In the present case, the Board concluded that the Employer's proposed direct dealing clause is not distinguishable from a management rights clause authorizing an employer to take unilateral action, inasmuch as each would enable the Employer to settle terms and conditions of employment without consulting the Union. 131 L.R.R.M. at 1462 n.8. The Union, in the other hand, contends that because the direct dealing clause involves the Employer in individual bargaining, the Board's decision is inconsistent with the institution of collective bargaining established in and protected by the NLRA.

The Union relies principally upon *Borg-Warner*, in which the employer insisted upon, *inter alia*, a "ballot" clause that required the union to hold a secret vote on the employer's last offer before

calling a strike. Accepting the Board's distinction between mandatory and non-mandatory (or permissive) subjects of bargaining, the Court held that the ballot clause was non-mandatory because, unlike a non-strike clause, which "regulates the relations between the employer and the employees," a ballot clause "deals only with relations between the employees and their unions." 356 U.S. at 350, 78 S.Ct. at 723. The Court also observed that the clause would "substantially modif[y] the collective bargaining system provided for in the statute by weakening the independence" of the union because it "enables the employer, in effect, to deal with its employees rather than with their statutory representative." *Id.*

The Board regards *Borg-Warner* as distinguishable on the ground that "[t]he ballot clause in issue [there]," as the Supreme Court noted, " 'settle[d] no term or condition of employment,' and 'deal[t] only with relations between the employees and their unions.' " 131 L.R.R.M. at 1461 n.4 (quoting *Borg-Warner*, 356 U.S. at 350, 78 S.Ct. at 723). The Board reasons that the direct dealing provision here is mandatory because, like the management rights clause held mandatory in *American National,* it reserves a mandatory issue for future determination without the participation of the Union; each clause, in other words, involves a waiver of the union's statutory bargaining rights in a narrow area. *Id.* at 1462. True enough. The clause at issue here also, however, unlike a management rights clause, intrudes into the relationship between the employees and their Union in a manner redolent of the ballot clause in *Borg-Warner.*

By allowing the Employer to bargain directly with its employees, Toledo Blade's proposal would deprive the Union *pro tanto* of its central statutory role as their representative in dealing with the Employer. This direct dealing clause, therefore, is different in kind from the management rights clause in *American National,* which would have ceded back to the employer an area within which it could set the terms and conditions of employment notwithstanding the union's statutory right to bargain over those

matters. The employer's subsequent decisions would be made unilaterally; they would not entail its negotiating with its employees. In contrast, the clause at issue here contemplates direct negotiations between employer and employee: its intent and effect are to exclude the Union from their "discussions . . . concerning the acceptance, rejection or changes in retirement and/or separation incentive offers." While the Court in *Borg-Warner* observed that the ballot clause would "enable the employer, *in effect*, to deal with its employees rather than with their statutory representative, 356 U.S. at 350, 78 S.Ct. at 723 (emphasis added), Toledo Blade's clause would authorize it *in fact* to deal with its employees, to the exclusion of the Union, in negotiating the terms and conditions of retirement. The clause does not, therefore, merely retain for the Employer unilateral authority to set certain terms and conditions of employment, as does a traditional management rights clause. *See, e.g., NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 878 n.4 (9th Cir. 1978) (text of management rights clause).

The Board calls the distinction between unilateral action and direct dealing, as drawn by the dissenting member, a "distinction without a difference." 131 L.R.R.M. at 1462 n.8. But there is a difference; where a right is reserved to management, the employee is not put into the position of negotiating with his employer without the participation of his union.

The Board's apparent indifference to whether the retirement incentive issue is settled through collective or individual bargaining is as surprising as its implications are broad. So far as the Board's reasoning goes, an employer might also insist to impasse upon the right to set each employee's wages and hours through an individual negotiation from which the union would be barred. The practical result would be a license for the employer to go to impasse over whether it has to deal with the union; that is the antithesis of good faith collective bargaining, which requires the employer to accept the legitimacy of the union's role in the pro-

cess. While the Board argues that the narrow scope of Toledo Blade's proposal works in its favor, it suggests no limiting principle by which to distinguish the broader proposal as we have instanced. In the absence of some reasoned distinction between the two cases, we are constrained to conclude that the Employer's demand constitutes an unfair labor practice. *Cf. Plumbers Local 387*, 266 NLRB 129, 134 (1983) (employer's demand to submit future contract disputes to arbitration held non-mandatory because it would violate the "fundamental right . . . to bargain collectively" (quoting *Sheet Metal Workers Int'l Ass'n Local 59*, 227 NLRB 520, 521 (1976)).

Like the "ballot" clause in *Borg-Warner*, the direct dealing provision here would "substantially modif[y] the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees." 356 U.S. at 350, 78 S.Ct. at 723. Indeed, the ballot clause merely subjected the union's leadership to the check of an "advisory vote" before it could call a strike, *id.*; the direct dealing clause excludes the Union altogether from a role in the bargaining process. The proposal thus represents at least as significant an infringement upon the system of collective bargaining as the one the Court held non-mandatory in *Borg-Warner.*

The proposed clause is particularly offensive to the principle of collective bargaining because it would put the Employer in a position to exert a highly divisive force among the members of the bargaining unit. By negotiating directly with employees in an attempt to buy out some number of lifetime job guarantees at the lowest cost, the Employer could effectively put the employees into competition with each other to sell out at the lowest price. The clause thus not only displaces the Union from its representational role, it also gives the Employer the opportunity to destroy the cohesiveness of the Union's membership.

We recognize that, contrary to the Union's contention, the best interests of the individual employees who have lifetime job guar-

antees will not necessarily be furthered by requiring the Employer to procure the Union's consent before it deals directly with employees on the terms of their separation and retirement. Indeed, the Union acknowledges that it regards those guarantees as a "group asset," which certainly suggests that an individual employee willing to sell may not, in the Union's view, be entitled to the full price that the Employer is willing to pay. As the Supreme Court has recognized, however, "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." *Vaca v. Sipes*, 386 U.S. 171, 182, 87 S.Ct. 903, 912 17 L.E.2d 842 (1967); *see also Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 62, 95 S.Ct. 977, 984-85, 43 L.Ed.2d 12 (1975) ("the superior strength of some individuals or groups might be subordinated to the interest of the majority"). That is not a weakness in, but a necessary source of strength to, the system of collective bargaining established by the NLRA, with which the Employer's proposal is fundamentally inconsistent.

III. CONCLUSION

In view of the foregoing, we grant the petition for review and remand the matter for further action consistent with our conclusion that the Employer's bargaining conduct violated § 8(a)(5) of the NLRA.

So ordered.

APPENDIX B

131 L.R.R.M. (BNA) 1460

The TOLEDO BLADE COMPANY, Toledo, Ohio, and TYPOGRAPHICAL UNION LOCAL 63, Case No. 8-CA-16067, June 15, 1989, 295 NLRB No. 68.

Before NLRB: Stephens, Chairman; Johansen and Cracraft, Members.

The Respondent publishes The Toledo Blade, a daily newspaper in Toledo, Ohio. The Charging Party has represented the Respondent's composing room employees for a number of years and the Respondent and the Charging Party have been parties to successive collective-bargaining agreements.

In the 1976-1979 and 1979-1982 collective-bargaining agreements between the Respondent and the Charging Party the following language appeared in article V, section 5:

> "The Company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the Company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto."

The parties stipulate that the intent of article v, section 5 as negotiated is to permit the Respondent to make retirement and/or separation incentive offers directly to individual employees, with the Charging Party having no right to participate in discussions between the Respondent and individuals concerning the acceptance, rejection, or changes in the retirement and/or separation incentive offers.

The 1979-1982 collective bargaining agreement expired March 21.[1] The parties had been negotiating a successor agreement since approximately February. About April 23 Respondent demanded, as a condition of consummating any collective-bargaining agree-

[1]All dates refer to 1982 unless otherwise specified.

ment, that the Charging Party agree that any agreement contain the article v, section 5 provision.

All contractual issues have been resolved with the exception of the aforementioned clause, concerning which the parties bargained to impasse.

Contentions of the Parties

The General Counsel and the Charging Party contend that the Respondent's insistence to impasse on this contractual provisions involving an allegedly nonmandatory subject of bargaining, namely the waiver of the Charging Party's statutory right to represent unit employees concerning retirement and/or separation incentives, constitutes a per se violation of Section 8(a)(1) and (5) of the Act. They further argue that the subject contractual provision permits the Respondent in effect to unlawfully bypass the exclusive bargaining representative and to negotiate individually with bargaining unit members, thereby forcing the Charging Party to relinquish its statutory role as representative of unit members. They assert that the Respondent engaged in bad-faith bargaining by insisting on the clause.

The Respondent contends that the contractual provision involves a mandatory subject of bargaining and that it may lawfully insist on its inclusion as a condition to agreement on any new collective-bargaining agreement. The Respondent further argues that, because the employees have life-time job guarantees that prevent the Company from forcing retirement or other separation incentives on them, its conduct in negotiating to retain the right to deal directly and noncoercively with employees in this very limited area does not tend unlawfully to undermine the Charging Party's status or otherwise constitute bad-faith bargaining.

Discussion

The issue here is whether the Respondent may lawfully insist as a condition of consummating any collective-bargaining agreement that the agreement contain a provision waiving the Charg-

ing Party's right to participate in the Employer's negotiations with individual bargaining unit members on early retirement and separation incentives. It is well settled that the parties to collective-bargaining negotiations may bargain to impasse regarding subjective [sic] within the scope of "mandatory" bargaining (i.e., "wages, hours and other terms and conditions of employment") while it is unlawful to insist on "permissive" subjects as a condition to reaching agreement. *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 [42 LRRM 2034] (1958). Thus the Board's characterization of a proposal as "mandatory" or "permissive" determines whether the proposing party may insist that the clause be included in the collective-bargaining agreement.[2]

We find that the contractual provision in dispute is a mandatory subject of bargaining. Initially we note that the specific subject matter of the provision—retirement and separation incentives—has been held to be a mandatory subject of bargaining.[3] Because such matters are terms and conditions of employment within the meaning of Section 8(d) of the Act, both the Respondent and the Charging Party have a statutory right to bargain to impasse concerning retirement and separation incentives.[4] The contractual provision herein would require the Charging Party to waive its statutory right to act as exclusive collective-bargaining representative for any affected employee. However, inclusion of such a waiver provision in the proposal does not "transform" it

[2]Primary responsibility for determining the scope of this statutory duty to bargain is vested with the Board. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 [101 LRRM 2222] (1979). If reasonably defensible, the Board's decision in this area should not be rejected by a reviewing court even though the court may prefer another view of the statute. *Id.* at 497.

[3]*Baltimore News American*, 230 NLRB 216, 217-218 [95 LRRM 1274] (1977), enfd. as modified 590 F.2d 554 [100 LRRM 2320] (4th Cir. 1979); *A.S. Abell Co.*, 230 NLRB 17, 18 [95 LRRM 1284] (1977), enfd. as modified 590 F.2d 554 [100 LRRM 2320] (4th Cir. 1979).

[4]The "ballot clause" in issue in *Borg-Warner, supra*, is in distinguishable because it "settle[d] no term or condition of employment" and "deal[t] only with relations between the employees and their unions. 356 U.S. at 350.

from a mandatory to a permissive subject of bargaining.[5] In this respect, the proposal is similar in effect to other waiver-of-bargaining clauses such as certain management-rights and zipper clauses that have been held to be mandatory subjects of bargaining. *NLRB v. American National Insurance Co.*, 343 U.S. 395, 409 [30 LRRM 2147] (1952); *NLRB v. Tomco Communications*, 567 F.2d 871 [97 LRRM 2660] (9th Cir. 1978).

It is well established that it is not illegal per se for an employer to propose and bargain concerning a broad management-rights clause or a zipper clause and this is true regardless of the fact that inherent in such clauses is the proposed waiver of the unions' statutory bargaining rights.[6]

The retirement/separation incentives proposal here would allow the employer to deal directly with unit employees in the area of retirement/separation incentives, hence involving a waiver of statutory rights in a narrow area.[7] The clause gives Respondent the right only to *offer* retirement or separation incentives. They cannot be forced on employees. The Respondent bargained to impasse on the retirement/separation incentives provision. Nothing in the record, however, reveals that the Respondent's total

[5]The contractual provision herein further contemplates that retirement/separation incentive packages not be subject to arbitration. This aspect of the proposal, affecting the scope of arbitration, is also a mandatory subject of bargaining. *See United States Gypsum Co.*, 94 NLRB 112 [28 LRRM 1015] (1951).

[6]*American National Insurance, supra* at 409; *Tomco Communications, supra* at 879 (holding that a zipper clause is nothing but a diluted form of waiver and so is governed by the same principles that apply to a management function clause).

[7]Indeed, the provision in question was included in the two most recent collective-bargaining agreements between the parties, and the parties reached agreement on all other subjects in the instant agreement. *Cf. Modern Mfg. Co.*, 292 NLRB No. 3 [130 LRRM 1269] (Dec. 20, 1988), finding that the respondent engaged in unlawful surface bargaining when, inter alia, it "repeatedly demanded the right to act unilaterally on *virtually every subject that the parties negotiated*." (Emphasis added.)

bargaining posture indicated a desire to avoid reaching an agreement. Under these circumstances, we conclude that the Respondent did not bargain in violation of Section 8(a)(5) and (1) of the Act by its insistence to impasse on the retirement/separation incentives provision or its overall course of conduct in negotiations with the Charging Party.[8]

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[8]Unilateral implementation of such a proposal may not be privileged. *See Colorado-Ute Electric Assn*, 295 NLRB No. 67 [131 LRRM 1457] (June 15, 1989).

Our dissenting colleague concedes, as he must, that "the clause here addresses a mandatory subject of bargaining." Our dissenting colleague also acknowledges that the Respondent could lawfully insist to impasse on a retirement/separation incentives clause modeled on the management rights clause considered in *American National Insurance*, *supra*, that "contemplated initial unilateral action by the employer." Our dissenting colleague concludes, however, that the clause before us is a permissive subject of bargaining because it "involve[d] one-on-one negotiations with the employees with the door shut to union participation of any sort." Thus, the dissent rests entirely on a purported distinction between clauses, such as the one in issue in *American National Insurance*, which "contemplate initial unilateral action by the employer" and are mandatory subjects of bargaining, and clauses, such as the one in issue here, which "substitut[e] . . . an individual negotiation process for the collective process contemplated by the Act" and are permissive subjects of bargaining.

We believe that our dissenting colleague offers a distinction without a difference. When an employer acts unilaterally with regard to a mandatory subject of bargaining, it is directly setting employees' terms and conditions of employment without any consultation with a labor organization. In such an instance, "the real injury . . . is to the union's status as bargaining representative." *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 fn. 15 [64 LRRM 2065] (1967). Indeed, it is for these reasons that, in general, unilateral changes in mandatory subjects of bargaining are proscribed by Sec. 8(a)(5) as a "refus[al] to bargain collectively . . ." In other words, regardless of whether the employer engages in unilateral action or in direct dealing, the right that is infringed on is the same. In fact, the terms are often used synonymously, as in *Modern Mfg.*, *supra*, 292 NLRB No. 3, slip op. at 4 [130 LRRM 1269], a case relied on by our dissenting colleague. In view of the foregoing, we find it highly anomalous, to say the least, that our dissenting colleague would reach different outcomes in these kinds of cases depending on whether, in his view, the clause privileged initial unilateral action or direct dealing.

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STEPHENS, Chairman, dissenting:

I. As correctly framed by the parties themselves, the issue in this case is whether the contractual proposal that the Respondent-Employer insisted on to impasse settled term or condition of employment that could unduly undermine the representative status of the Union. If the question is answered in the negative, the complaint, which alleges a per se violation of Section 8(a)(5), must be dismissed. If, however, the Respondent's proposal settled no term or condition of employment, or in any event, is deemed to undermine the representative status of the Union, then a violation must be found.

My colleagues in the majority, applying the mandatory-permissive dichotomy of *Borg-Warner*,[1] find that the provisions would settle a term of employment, involving retirement and severance benefits, and therefore as a mandatory subject of bargaining, entitles the Respondent to insist on it to impasse. Thus, the complaint is ordered dismissed. The majority does acknowledge that the proposal would entail a "waiver" of the Union's right to bargaining in the sense of jointly participating in the negotiation of compensatory benefits. However, the majority concludes that such a waiver is a "narrow" one, both in terms of subject matter and in the sense that the Employer can only offer but not "force," its proposed terms on individual employees. Were we writing on a cleaner slate, *circa* 1950, my colleagues' reading of Section

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Finally, on the facts of this case, our dissenting colleague's distinction is devoid of meaning. Our dissenting colleague does not dispute that the Respondent can only offer retirement or separation incentives; they cannot be forced on employees. Therefore, the Respondent is simply not in a position to make a unilateral change with respect to this subject matter. Rather, the Respondent must secure the employees' consent, which can only be achieved through the process of negotiation.

[1]*NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 [42 LRRM 2034] (1958).

8(a)(5), as applied to the instant record, might have persuasive appeal.[2] For there is no evidence that the Respondent unilaterally attempted to circumvent the Union and deal with the employees without its permission or knowledge. Moreover, the barren record before us does not show that the Respondent desired to avoid reaching a contract with the Union, or that it conducted its negotiations with a closed mind or otherwise in bad faith over the allocation of responsibility for determining early retirement/separation benefits. Indeed, the Union had twice previously agreed to the provisions now under review. However, I believe, that whatever latitude commentators thought the Board may have had at one time in finding, on a record such as this one, insufficient evidence of improper bargaining has long since been foreclosed by the Supreme Court's interpretation of the statute itself.[3] In short, my colleagues inadequately come to grips with the pertinent decisions of the Court and gloss over the ones on which they do rely.

II. The facts, as submitted by a sparse stipulation, are quite simple. In negotiations for a collective-bargaining agreement to succeed the expired 1979-1982 agreement, the Respondent insisted that it would not sign a new agreement unless it contained the following clause:

> "The Company shall have the right to offer other retirement and/or separation incentives in amounts, under terms and conditions, and for periods of time that the company shall in its sole discretion deem appropriate, and the Union waives the right to raise a dispute or arbitrate with respect thereto."

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[2]See Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 403-404 (1950).

[3]See *Fibreboard Corp. v. NLRB*, 379 U.S. 203, 217, 219 fn.2 [57 LRRM 2609] (1964) (Stewart, Douglas, and Harlan, J.J., concurring) ("There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain. . . . But too much law has been built upon a contrary assumption for this view any longer to prevail. . . . ")

The parties further stipulated that such a clause (with an additional provision not here relevant) had been agreed to by the Union in two previous bargaining agreements (1976-1979 and 1979-1982) and that what the Respondent sought to achieve through the clause was not simply to determine such incentives on its own and unilaterally implement them, but rather to "make retirement and/or separation incentive offers directly to individual employees" and to exclude the Union from *any* participation in "discussions" between the Respondent and the individuals concerning their "acceptance, rejection, or changes" in the offers.

The purpose of obtaining this individualized negotiating authority is rooted in the dynamic changes that have taken place in the newspaper industry.[4] Rapid technological innovations, brought on by the computer, had rendered many jobs, such as those in the typical composing room, redundant and obsolete. To overcome the natural resistance of the organized sector to the adoption of these labor-saving developments, the industry agreed, through collective bargaining, to pay a "very high" price, which as explained by an amicus during oral argument, "came in the form of guaranteed lifetime jobs for employees whose services were no longer needed or would no longer [be] need[ed] in the future."[5] However, because of the unexpectedly rapid pace of innovation, job redundancy proved even higher than expected and in turn the lifetime job guarantee evidently proved to be more expensive than estimated. Thus, the industry hit on the strategy of realizing cost savings by "buying out" the lifetime employment guarantees on an individual basis. These buyouts took the form of so-called retirement or separation incentives.[6] In the instant

[4]See, generally, Tr. oral argument at 115-118 (Mr. Charles Cole, American Newspaper Publishers Assn., appearing as amicus in support of Respondent-Employer).

[5]*Id.* at 116.

[6]The stipulation refers to the benefits as "other retirement and/or separation incentives," but it contains no description of what these

(*footnotes continued on next page*)

case, Toledo Blade obtained from the Union in two previous contracts the authority to negotiate such buyouts directly with employees without the Union's involvement. But during negotiations for a new contract in 1982, the Union refused to renew this provision. As noted before, so far as we know, there is no evidence that the Respondent engaged in any bad-faith bargaining.

III. No one disputes that matters pertaining to compensation, whether it be in the form of retirement benefits, lump-sum severance benefits, or payments for retraining fall within the meaning of "wages" in Section 8(d). As such, they are items over which an employer and a union are under a mandatory duty to bargain. In the vast majority of instances, a consummated agreement will specify the substantive standards, jointly arrived at during contract negotiations, that "will fix for the future the rules of the employment for everyone in the unit."[7] What takes place during

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might entail. During oral argument, an amicus appearing in support of the Respondent stated that these incentives were "not unusual" for the newspaper industry and variously took the form of (1) "early retirement," (2) "retraining of employees to perform another kind of work," and (3) "releasing employees with a nest-egg so they could pursue higher education or other careers for the balance of their productive years." Id. at 118. The latter item would seem to be one-time lump-sum payment, whereas an early retirement benefit is usually a periodic payment of a determinable benefit paid over the life of the retiree. For purposes of resolving the legal issue before us it makes no difference what form the incentive benefit takes, and for the sake of convenience are generally referred to throughout this opinion as buyout or retirement benefits.

[7] *Hughes Tool Co. v. NLRB,* 147 F.2d 69, 72 [15 LRRM 852] 5th Cir. 1945).

Retirement benefits are a good example of a subject that must be delineated in great detail in the collective-bargaining agreement, which generally incorporates by reference pension plan documents. The latter are very technical, covering a broad range of subjects (including coverage, benefit levels, participation, vesting, fiduciary obligations, and other matters of administration). Congress added to the complexity, when it enacted, in 1974, the Employer Retirement Income Security Act (ERISA), 88 Stat. 829, as amended, 29 U.S.C. § 1001 et. seq. ERISA

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the life of the contract is the application of the standards to the employees without substantial refinement or bargaining over the standards themselves. The buyout proposal here does not fit this mold. It contains no substantive formula by which to compute any of the forms of benefits contemplated by it. Neither the Union nor the unit employees would have any notion at the commencement of the contract term either what sort of buyout an employee might be expected to receive or the value of it, should he decide to give up his lifetime job guarantee. For that matter, the Respondent might not have any idea either. Moreover, the proposal provided for the almost total exclusion of the Union from the negotiations that the Respondent might initiate with individual employees.[8] In essence, the buyout payments would be at whatever amounts the employer could persuade the employees to accept in face-to-face, one-on-one meetings.

Both the Respondent and the majority analogize the buyout

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establishes comprehensive, minimum standards for assuring that whatever benefits an employer promised during a worker's employment years would be paid during his retirement years. Pension plans customarily make provision for early retirement, and the benefit is generally calculated in accordance with a formula that takes into account such things as an employee's age, accrued service, salary, and a discount factor, the latter of which is used to compute what the actuarially reduced value of a normal retirement benefit will be at the time of early retirement. As one authority has noted, plans subject to collective bargaining will commonly provide for a specified percentage discount for each month by which early retirement precedes the normal retirement date. See generally D. McGill, *Fundamentals of Private Pensions* at 117-120 (5th ed. 1984).

[8]Respondent's counsel during oral argument conceded that under its proposal the employees could not insist on the presence of their union representative. However, he asserted that the Employer could always terminate discussions and the Employer "set no limits" on an employee's right to consult with the union representative. Tr. oral argument at 25. Still, the Union could not enlarge its role beyond that of sideline coach, because, according to the stipulation, the contract proposal required the Union to waive the right to raise a dispute or arbitrate with respect to any buyout offer.

proposal to the management rights clause, which the Supreme Court reviewed in *NLRB v. American National Insurance Co.*, 343 U.S. 395 [30 LRRM 2147] (1952). There the Board had attempted to declare as per se unlawful any employer insistence to include any such clauses in the collective-bargaining agreements. The Supreme Court flatly rejected this hardline position, finding it out of step with the prevalence of "management functions" clauses in many U.S. labor agreements, some of which had been endorsed by the War Labor Board. The Court curtly observed:

> "Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the *extent of union and management participation* in the administration of such matters is itself a *condition of employment to be settled by bargaining*." *Id* at 409 [emphasis added].

In the abstract, there is admittedly no great leap in the logic from the above-quoted rationale to the argument that the Respondent here is simply bargaining over the extent to which Union and management will respectively participate in the settling of early retirement benefits, namely, no role for the Union and an exclusive role for management. However, in my view, neither the holding nor facts of *American National Insurance* permit this logic to run the full course asserted here. The holding is limited to two propositions: (a) *Not all* management functions were per se beyond the bounds of what an employer could lawfully insist on, and (b) the employer could insist on the particular management functions clause at issue there—a clause providing that certain subjects[9] were within management's sole discretion to set initially and could be maintained if, through the grievance process (with excluded arbitration) the union failed to persuade it to change its mind about particular decisions taken pursuant

[9]These are hiring; promotion; discharging, demoting, or disciplining for cause; work scheduling.

to the clause. *Id.* at 398, 409. Equally significant, the clause did not contemplate direct negotiations between employer and employees on the subjects included in the clause. Thus, the Court in *American National Insurance* had no occasion to reexamine, much less retreat, from the the proscriptions against direct employer-employee dealing, which the Court itself had articulated in the earlier case of *Medo Photo Supply Corp. v. NLRB*, 321 U.S 678 [14 LRRM 581] (1944).

In *Medo*, which my majority colleagues do not discuss, the Court affirmed the principle that an employer whose employees are represented by a labor organization has a duty to recognize and negotiate with that representative as to any changes in the employees' terms and conditions of employment, and further that it may not negotiate directly with the employees on such matters. Indeed, even if *employees* seek such individual bargaining and are content to exclude the union from the negotiations on the subject in question, the employer violates its statutory obligation by engaging in such negotiations behind the union's back.[10] Bargaining on an individual basis is simply "subversive of the mode of collective bargaining which the statute has ordained," the Court observed (Id. at 684).[11]

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[10]Of course, if a majority of the employees repudiated the union as their collective-bargaining representative for all purposes and such a repudiation may be honored under Board law (e.g., it is not a product of the employer's unfair labor practices and it did not take place during the initial certification year), the employer is free to deal directly with individuals. The union in such a case is merely a former representative, and the employer has no obligation to deal with it on any subject. *J.I. Case Co. v. NLRB*, 321 U.S. 322, 337 [14 LRRM 501] (1944). There is no contention in the present case that a majority of the employees had repudiated the Union.

[11]The Court cited, *inter alia*, its decision in Order of *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 [14 LRRM 506] (1943), a Railway Labor Act case handed down the same term, in which it had noted that the terms granted to individuals may be of interest to the entire unit and that thus a union must be free to bargain over

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It is true that strictly speaking the issue in *Medo Photo* was not whether the employer had bargained in bad faith with the union in violation of the precursor of Section 8(a)(5). Unlike here, the employer in fact had not attempted to secure from the union the right to deal directly with the unit employees over any employment terms. Rather, the employer dealt with the employees without union knowledge or approval, which the Court found constituted an 8(a)(1) interference with the employees' Section 7 rights. The proof of the interference was, of course, in the pudding, for as an immediate result of these negotiations the employees repudiated the union as their bargaining representative.[12]

Thus, it is arguable that the holding of *Medo Photo* does not address the precise issue in the instant case in which there is no evidence that the Employer is attempting to jettison the Union by direct dealing with employees. But it is apparent that in deciding *Borg-Warner Corp.*, supra, which was decided after *American National Insurance,* supra, the Court incorporated the animating principles of *Medo Photo* into the definition of good-faith bargaining under Section 8(a)(5).

In *Borg-Warner*, the Court confronted the question whether an employer might violate Section 8(a)(5) simply by insisting on certain types of proposals as a condition to execution of the col-

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"exception[s]" to the rules as well as over the rules generally applicable to all. *Id.* at 347. The Court in *Railroad Telegraphers* did also note that it "may be agreed that particular situation may be reserved for individual contracting" but this appears in context to refer to an "agreement" arrived at through collective bargaining "that the Company should be free to negotiate with the agents [i.e., employees] severally." Ibid. The Respondent has seized on a similar statement in *J.I. Case*, supra, to justify its conduct here. But the Court's observation in that case that "it is possible for *the collective bargain* to prescribe only minimum rates or maximum hours or *expressly* to leave certain areas open to individual bargaining" (321 U.S. at 338; emphasis added), also appears to contemplate mutual agreement, not necessarily unilateral insistence.

[12]The Court did sustain a refusal-to-bargain violation under Sec. 8(a)(5), but it was grounded on the employer's refusal to recognize the union following the employees' induced repudiation of the latter.

lective-bargaining agreement. Of relevance here was a ballot proposal requiring a secret vote among employees on whether to accept or reject the employer's last offer, whether to strike, and whether the contract once adopted should be amended, modified, or terminated. The Court characterized the clause as lawful if agreed to by both parties, but held that the employer could not lawfully insist to impasse. It noted that the ballot clause did not regulate the employer-employee relationship on any particular condition of employment but rather dealt with the relations between the employees and their union. In the latter regard, the Court, citing *Medo Photo,* found that the proposal weakened the independence of the union by enabling the employer "in effect, to deal with its employees rather than their statutory representative."[13]

[13]356 U.S. at 350. In response to the employer's argument that the secret ballot clause was merely a less restrictive variation of a no-strike clause, which is concededly a mandatory subject of bargaining, the Board opinion in *Borg-Warner* contains the following explanation:

> ". . . the strike-ballot clause here, while incidentally limiting the individual's right to strike, is primarily concerned with the mechanics of testing the statutory representative's power to call a strike or to terminate or amend the contract during its term—a purely internal matter unrelated to any condition of employment. Indeed, the strike-ballot clause is in essence a procedure designed to force all employees in the unit, as individuals, to pass upon the respondent's last offer. In our opinion, the requirement that employees be given an opportunity to vote on the Respondent's last offer or to terminate or amend the contract, is simply an attempt to resolve economic differences at the bargaining table between an employer and the statutory agent by dealing with the employees as individuals. *In principle, there is little, if any, difference between an employer taking individual proposals directly to the employees and an employer requiring that the bargaining representative obtain approval or disapproval of any economic proposal as a condition precedent to the representative's exercise of statutory powers.* Either situation is in derogation of the status of the statutory representative and thus violates the exclusive representation concept embodied in the Act. Indeed, *insistence on a strike ballot clause means only that the union must dilute its authority, diffuse its responsibility, and ultimately*

(*Footnote continued on next page*)

In my view, the retirement incentive clause on the instant case suffers from some of the same infirmity as the strike-ballot clause in *Borg-Warner*. To be sure, the clause here addresses a mandatory subject of bargaining.[14] However, the clause does not simply reserve to the Respondent the unilateral discretion to devise an individually tailored package of benefits that is payable to an employee who is eligible for retirement. Rather it would shove the Union aside and establish a regime of direct negotiation one-on-one with employees themselves.[15] In two respects, the Union's ability to exercise its responsibilities as exclusive bargaining representative would be undercut. First, an eligible employee would be deprived of the benefit of the Union's negotiating clout and its expertise in evaluating the merits and advisability of a retirement offer. In short, the Union would not be able to shield employees from any over-reaching leverage by the Employer. Second, the

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dissipate its strength. . . . It is thus apparent that . . . we do not predicate our conclusion on the theory that the continued representative status of the Union might be lost by a majority vote on any issue balloted upon, but rather on the fact that the requirement of a poll among the employees constitutes [sic] a subversion of the collective bargaining process"

Borg-Warner Corp., 113 NLRB 1288, 1295 [36 LRRM 1439] (1955) emphasis in original deleted and other emphasis added).

It is noteworthy that four justices in *Borg-Warner* believed that the Court's holding was incompatible with *American National Insurance,* supra, thus suggesting that there may be some tension between the two decisions.

[14]Fn. 7, supra. See also *Baltimore News American,* 230 NLRB 216, 217-218 [95 LRRM 1274] (1977), enfd. 590 F.2d 554, 556 [100 LRRM 2320] (4th Cir. 1979).

[15]See *Modern Mfg. Co.*, 292 NLRB No. 3 slip op. at 4 [130 LRRM 1269] (Dec. 20, 1988). In the course of upholding a finding of unlawful surface bargaining by an employer, the Board stressed that the employer's "insistence that it retain the ability to deal directly with unit employees [through a proposal to enter into individual contracts without the union's prior approval and a subsequent proposal to give out bonuses or create an incentive program] strikes at the very heart of the union's representative function to bargain collectively on behalf of the unit employees."

Union could not effectively monitor the incentive program from the standpoint of its impact on the pool of financial resources available to the unit as a whole.[16]

Notwithstanding these perils to the bargaining process, the Act does not foreclose the Union itself from voluntarily exposing itself to them. This may seem like a curious feature of the Act. But as the Board repeatedly had emphasized, the Act is an accommodation of many competing considerations. Just as the process is worthy of protection, so is the freedom of the employee's exclusive representative to obtain terms and conditions that in its view best satisfy the economic goals and aspirations of the employees. Thus a union is entitled to decide for itself whether the financial incentives that the employer is willing to make to induce agreement on a provision is worth accepting certain constraints on the union's bargaining role. Moreover, it may be part of the customs and practices of a particular industry that employers will negotiate directly with certain classifications of workers on certain aspects of employment, the publishing industry having a long history of this.[17] Thus, it would plainly not be unlawful for the Union here to agree to the incentive program, as it had in two previous contracts. But the Union nevertheless retains the right to reevaluate the situation and to reassert its prerogatives in bargaining for a new contract, as it has done here.

At the same time, I do not view the Respondent here as having its hands tied in the face of the Union's fixed opposition to its proposal. It is not barred from presenting at the bargaining table

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[16]Cf. *Wood v. National Basketball Assn.*, 809 F.2d 954, 961 [124 LRRM 2446[(2 Cir. 1987) (Winter, J.) ("recognition of a right to individual bargaining without the consent of the exclusive representative would undermine the status and effectiveness of the exclusive representative, and result in individual contracts that reduce the amount of wages or other benefits available for other workers").

[17]See Cox & Dunlop, *Regulations of Collective Bargaining by the National Labor Relations Board*, 63 Harv. L. Rev. 389, 409-410 & fn. 71 (1950).

retirement/separation incentives in a management functions clause modeled on the one considered in *American National Insurance*, supra.[18] As noted above, that clause contemplated initial unilateral action by the employer, but it did not involve one-on-one negotiations with the employees with the door shut to union participation of any sort.[19]

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[18]In suggesting this alternative, I am assuming that even under the unique circumstances of this case, involving lifetime employment guarantees, which employees obtained under the two previous contracts, that the Union could still be required to negotiate modifications in those provisions insofar as they affect current employees in the unit. The parties would have the discretion to decide on a clause "fixing standards" by which the lifetime guarantee provisions are modified to require early retirement or a clause that provides "for more flexible treatment," involving the "extent of union management participation in the administration" of the modifications. See *American National Insurance*, 343 U.S. at 409, quoted in pertinent part in text infra. The provisions at issue in the instant case is most analogous to "flexible" approach embodied in the management rights clause in *American National Insurance*.

I do not view this case as analogous to the situation in which an employer wants to obtain a modification of retirement benefits, which have already vested in particular individuals who have retired from the work force. Cf. *Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 672-673 [120 LRRM 2432] (6th Cir. 1985) ("A union may choose to forego nonvested retiree benefits in future negotiations in favor of more compensation for active employees. The union may not, however, 'bargain away retiree benefits which have already vested in particular individuals,' " quoting *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 181 fn. 20 [78 LRRM 2974] (1971)).

[19]*Cf. Long Lake Lumber Co.*, 182 NLRB 435 [74 LRRM 1116] (1970), affd., sub nom. *Woodworkers Local 3-10 v. NLRB*, 458 F.2d 852 [79 LRRM 2259] (D.C. Cir. 1972), in which the Board rejected allegations of bad-faith bargaining by an employer who had proposed a broad management rights clause. The board upheld the clause even though it related to matters on which the contract was left silent, reasoning that the proposal

> "would not have precluded future bargaining. The management authority Respondent demanded was only to take *initial* action without consulting the Union in advance. Once such action was taken, the Union would have the right, and Respondent the correl-

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In sum, I disagree with my colleagues that the "specific subject" of the clause at issue here was simply retirement incentives. Rather, the essence of the proposal was the substitution of an individual negotiating process for the collective process contemplated in the Act.[20] I similarly disagree with the majority's impli-

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ative obligation, to subject the action taken to *post hoc* review under the grievance procedures where the Union would be afforded the opportunity through give and take discussions to obtain a change in management's action."

[20]My colleagues suggest that my dissent articulates a "distinction without a difference" (leading to an anomalous result) between an employer unilaterally changing a term or condition of employment without prior union consultation (unlawful under *NLRB v. C&C Plywood Corp.*, 385 U.S. 421, 429 fn. 15 [64 LRRM 2065] (1967)) and an employer dealing directly with employees under the clause at issue here (which I supposedly would find unlawful).

With all respect, my colleagues misstate both the distinction I make and the conduct that I would find unlawful. The principal articulated in *C&C Plywood* is wholly irrelevant here; we are not confronted with an employer actually implementing unilaterally, without union approval, a substantive change in an existing contract. Nor do I posit that an employer cannot have the benefit of a clause, agreeable to the union, that permits direct dealing with employees. Indeed, I suggest just the opposite. The critical distinction that I advance hinges on the type or provision that an employer can *insist on to impasse* (absent evidence of bad faith)—on the other hand, a clause modeled after the one in *American National Insurance* by which the employer could unilaterally effectuate the retirement of an employee, with the union having the opportunity afterwards to grieve over the terms of retirement, including the manner of retirement and amount of the annuity, and on the other hand, a clause (like the instant case) that contemplates direct negotiation with employees over the terms and conditions of retirement, without any meaningful participation by the bargaining representative over such terms, either during the negotiation of the contract itself or during the life of the contract. That the former may be lawfully insisted on to impasse and the latter cannot is a legally cognizable difference, as the Supreme Court's opinions in *American National Insurance* and *Borg-Warner* make clear, and such distinction creates no anomaly.

My colleagues also reiterate their point that the clause here is saved by the fact that the employer can only "offer" retirement benefits to the individual employees and that it still must achieve agreement through

(*footnote continued on next page*)

cation that the absence of evidence as to the Employer's intent to avoid reaching an agreement is dispositive of this case. As *Borg-Warner* indicates, the absence of bad faith does not legitimate insistence on proposals that are nonmandatory subjects of bargaining by virtue of the fact that they seek to compel a union's acceptance of its displacement as bargaining representative. Accordingly, I dissent from the dismissal of the complaint.

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the "process of negotiation." To hold that the mere offer of terms directly to employees does not unlawfully bypass the union simply ignores the settled law. *Charles Parker Co.*, 285 NLRB No. 6, slip. op. at 6 [126 LRRM 1123] (July 30, 1987) (employer violated Sec. 8(a)(5) by presenting written contract proposal directly to employees).

APPENDIX C

29 U.S.C. § 158(a)(1), (a)(5), and (d)(1973 and 1990 Supp.)

§ 158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . .